



# North Dakota Attorney General's LAW REPORT

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## **SEARCH AND SEIZURE - CONSENT**

In *State v. Seglen*, 2005 ND 124, 700 N.W.2d 702, the court held that in a facility used for a public event the presence of conspicuously posted signs which stated that persons entering the arena were subject to search did not establish consent to search.

The privately owned and operated arena utilized University police officers to conduct a pat down search on persons entering the arena before a hockey game. Signs inside the arena warned patrons they were subject to search.

During a search the officer felt a bulge in the defendant's jacket and asked him to remove the item creating the bulge. The defendant removed a can of beer from his jacket. The defendant, who was under the age of 21, was cited for minor in possession of an alcoholic beverage.

The district court denied the defendant's motion to suppress the evidence found as a result of the search, finding the security measures taken by the arena that evening were reasonable because the game was between the University of North Dakota and the University of Minnesota, governors of both states were present, signs inside the arena warned entrants they were subject to search, and similar pat down searches were conducted on all persons wearing bulky jackets who entered through that particular gate.

In reversing the district court's suppression denial, the court noted the officer did not believe the defendant was hiding a weapon, but rather the

object spotted in the defendant's coat appeared to be a beverage container. The court concluded that because the officer admitted he did not believe defendant was armed, the search did not fall within the *Terry v. Ohio* exception.

Limited searches of persons entering airports and courthouses have been found constitutional in light of unprecedented airport bombings, aircraft privacy, and courtroom violence. The court rejected the state's argument that security needs at large arenas and sporting events are similar to airports and court houses. There was no history of injury or violence presented in this case and nothing in the record supported a suspicionless search of all patrons by a police officer.

The court also rejected the claim that because signs were posted inside the arena notifying patrons that they would be subject to search for their safety, the defendant consented to the search. Consent is a recognized exception to the warrant requirement. However, the state must show affirmative conduct by the person alleged to have consented consistent with giving consent, rather than merely showing the person took no affirmative actions to prevent the search. The fact that signs may have been conspicuously posted did not establish a consent to search. There was no evidence the defendant affirmatively consented to the search. Since the state did not meet its burden of establishing the defendant's consent, the consent exception to the warrant requirement was not applicable.

## **PRIOR CONVICTION - RULE 404(b) - RESTITUTION**

In *State v. Hatlewick*, 2005 ND 125, 700 N.W.2d 717, the court affirmed the defendant's conviction of willfully permitting livestock to run at large.

At trial, the defendant claimed his cattle escaped through a fence by accident or mistake. The prosecution presented evidence that the defendant previously had been convicted of

permitting livestock to run at large. In rejecting a claim of error, the court concluded the evidence was properly admitted under North Dakota Rule of Evidence 404(b). When using Rule 404(b), a trial court shall apply a three-step analysis that considers: (1) the purpose for which the evidence is introduced, (2) the evidence of the prior act or acts is substantial, reliable, or clear and convincing, and, in criminal cases, (3) whether there is proof of the crime charged which permits the trier-of-fact to establish the defendant's guilt or innocence independently on the evidence presented without consideration of the evidence of the prior acts.

Although the trial court did not make specific findings regarding this three step analysis, the record supported the trial court's decision to admit the prior conviction into evidence. The evidence was admitted to rebut the defendant's claim that the cattle running loose was a mistake or an accident. The criminal judgment submitted as evidence was clear and convincing. The trial court also had adequate proof of the crimes charged.

In addition, the trial court must decide whether, under North Dakota Rule of Evidence 403, the

probative value of the prior conviction outweighs any possible prejudicial effect. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

The court also concluded the trial court retained jurisdiction to enter a restitution order after the defendant filed his notice of appeal. In its criminal judgment, the trial court had reserved the right to amend the judgment to include restitution, and did so after notice and hearing although that amendment occurred after notice of appeal had been filed. Section 12.1-32-08(1), N.D.C.C., makes ordering restitution mandatory. The right to appeal is statutory in nature and the court has discouraged piecemeal appeals in civil cases but has never extended this policy to criminal cases. The defendant had a right to appeal from the judgment of conviction and may also appeal the order for restitution. Although the court prefers all relevant issues be raised in a single appeal, the court concluded that, had separate appeals been filed, they could have been consolidated on appeal and not offend the policy against piecemeal appeals.

### **NEW TRIAL - NEWLY DISCOVERED EVIDENCE**

In *Syverson v. State*, 2005 ND 128, 699 N.W.2d 855, the court affirmed the denial of an application for post-conviction relief based upon newly discovered evidence.

Syverson claimed that background information regarding a doctor who completed his psychiatric evaluation justified granting a new trial. He argued that information regarding disciplinary action taken against the doctor by a medical board could have been used to impeach the doctor's testimony if the state called him as a witness. The doctor was disciplined in Minnesota and North Dakota for improper sexual conduct with female patients, nurses, and staff. Syverson claimed the state's failure to discover this evidence violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963). He also claimed the North Dakota State Hospital's knowledge of the doctor's background should be imputed to the Cass County State's Attorney's office.

The court rejected this claim stating Syverson did not cite any law supporting his contention and the weight of authority was against such an imputation. The court refused to impute the State

Hospital's knowledge to the prosecution and was unwilling to place such an onerous burden on the state's attorney's office.

Syverson must prove the government possessed evidence favorable to him. In this case, the doctor became involved with the case when Syverson requested a psychological evaluation. The state did not join that request. Since Syverson withdrew his mental competency defense before trial, the doctor never testified. Syverson admitted that during his trial, the state was unaware of any matters relating to the doctor's medical license.

The court also rejected the claim that evidence regarding the doctor's license background was newly discovered evidence. The information about the doctor's background was published in a 1993 article in the St. Paul Pioneer Press, was not hidden away, was publicly disseminated, and easily accessible. Syverson was convicted in 1998. The court concluded that Syverson failed to establish the failure to learn about the evidence at the time of trial was not the result of his lack of diligence.

### **DISORDERLY CONDUCT - FREE SPEECH**

In *State v. Barth*, 2005 ND 134, 702 N.W.2d 1, the court affirmed the defendant's convictions of disorderly conduct, preventing arrest, and attempted simple assault.

During a dispute regarding hay that had been cut from another person's land, a sheriff responded to a call from the landowner. One of the individuals attempted to remove his machinery from the land but the defendant's father blocked the approach with a tractor, demanding payment of \$250. The sheriff asked the defendant and his father four or five times to move their tractor so the other person could remove his machinery but they refused. The sheriff then ordered the defendant off the property. The defendant refused, yelled obscenities, made obscene gestures, and allegedly attempted to hit the sheriff. With the assistance of another officer, the defendant was arrested. The defendant was wrestled to the ground and handcuffed.

The defendant asserted that his expressions during the incident were protected by the right of free speech under the first amendment to the United States Constitution. The defendant claimed he was arrested for opposing or challenging a police action verbally and by way of a gesture, that he made no threat of violence to the officer, did not attempt to strike the officer, and no profanities or gestures were directed toward

anyone other than the sheriff. The defendant claimed his situation was analogous to, and supported by, the conduct described in *City of Bismarck v. Schoppert*, 469 N.W.2d 808 (N.D. 1991).

The court distinguished *Schoppert*. In *Schoppert*, the profanity and vulgar expressions were directed at police officers without a breach of peace or otherwise threatening behavior. In this case, the defendant's behavior went far beyond the conduct exhibited in *Schoppert*. Before the arrest, the defendant made hand gestures close to the sheriff's face, put up his fist, and said "come on you son-of-a-bitch." The sheriff asked the defendant to calm down or risk arrest. The defendant, when told he was under arrest, swung and grazed the side of the sheriff's face. During the arrest the defendant used profanity and tried to kick the sheriff.

Despite the defendant's claim of constitutionally protected speech, the court believed that the defendant's persistent use of profane and threatening language and threatening hand gestures were reasonably found to be threatening and alarming. The defendant's threatening words and gestures were not constitutionally protected free speech under the first amendment.

### **APPEAL - DISMISSAL OF CRIMINAL INFORMATION - SEX OFFENDER REGISTRATION**

In *State v. Jackson*, 2005 ND 137, 701 N.W.2d 887, the court reversed a district court judgment dismissing a criminal charge against the defendant for failing to register as a convicted sexual offender. The district court held the law did not require the defendant to register a change of employment address.

At the close of the state's case in a bench trial the court granted the defendant's motion for judgment of acquittal stating the defendant was not guilty because the law required the defendant to provide new employment information only if the defendant changed his name, school, or home address. The state appealed the motion for judgment of acquittal. The defendant claimed the state had no right to appeal.

In a criminal action, the state has only such right of appeal as expressly conferred by statute. The state is not authorized to appeal from an acquittal.

However, the state may appeal from an order quashing an information or indictment or any count thereof. A district court order dismissing or quashing an information is appealable.

Whether the court's order is an acquittal or the equivalent of quashing the information is not controlled by the form of the judge's ruling. Rather, to determine an acquittal from a dismissal quashing the information, the court looks at the substance of the judge's ruling. When the trial court's decision is based upon a legal conclusion, the ruling constitutes a dismissal or quashing of the information from which the state has the right to appeal. In this case, the trial court construed the statute that it did not require an offender to register a change of employment address unless the offender had a change of residence address. There was no factual dispute that during the period alleged in the information the defendant changed only his employment address. The court

concluded the trial court's decision was based upon an illegal interpretation of the criminal statute not upon resolution of any factual element of the crime charged. The trial court's ruling was not a judgment of acquittal but a quashing of the information from which the state had a right to appeal.

In rejecting the trial court's interpretation of the registration statute, the court recognized that the intent of the registration provision under N.D.C.C. § 12.1-32-15 is to enable law enforcement to keep track of sex offenders and those who commit crimes against children. The registration information is necessary to aid in the investigation and apprehension of offenders and to protect the health, safety, and welfare of members of the local community and citizens of the state. To achieve the state's objective, the legislature conscientiously used the broad term "address" in specifying when a sex offender must register under the statute. The express language of the

statute provides that an individual must inform the law enforcement agency with whom he last registered of the new "name, school, residence address, or employment address." This language unambiguously requires a registered sex offender to inform law enforcement of a change of employment address.

In construing statutes, it is presumed a reasonable result is intended. The court interprets statutes to avoid unreasonable or absurd consequences. A more reasonable interpretation of the language, which effectuates the purpose of the statute to keep law enforcement informed of the whereabouts of sex offenders, is that either a change in residence address or a change in employment address triggers the statutory requirements and the offender must notify law enforcement of the change. A registered sex offender who changes his employment address must inform law enforcement of that change, in writing, within ten days.

#### **SEARCH AND SEIZURE - PRIVATE SEARCH - CANINE SEARCH**

In *State v. Ressler*, 2005 ND 140, 701 N.W.2d 915, the court held that the district court committed error in denying the defendant's motion to suppress evidence.

The defendant brought a box to a private shipping outlet. The business owner became suspicious of the defendant who seemed nervous, kept looking over his shoulder, and was shipping an uninsured next day air package. The package weight did not coincide with its stated contents. After the defendant left the store, the business owner opened the package and discovered numerous magazines, some which had scotch tape around three open sides. The owner opened one of the magazines. The owner found money throughout the pages. The owner called the police department.

An officer arrived at the store, saw what the store owner had uncovered and talked to the owner. The officer wanted to conduct a canine sniff on the package. The business was too small to conduct a valid test. The officer transported the package to a nearby law enforcement office. The canine alerted on the relevant box and, after the box and remaining magazines were searched, a total of \$9,800 in bills were found. During a search of the defendant's garbage, various items of drug paraphernalia were found. A search warrant was

obtained and additional drug paraphernalia was located at the defendant's residence.

The defendant claimed the initial seizure of the package without a search warrant or probable cause violated the constitution. The district court disagreed and denied the defendant's motion to suppress.

In reversing the district court, the court recognized that a private party search of the package, which was not done at the behest of a governmental official, did not implicate any constitutional protections. The record revealed the business owner displayed what he had uncovered to the officer and there was no indication the officer exceeded the scope of the private party search during his initial examination at the business.

However, the officer became suspicious and moved it to a nearby law enforcement center for a canine test. The court found that transporting the package from the private business was a seizure. The court concluded that a reasonable suspicion did not afford the police the option to transport the package to the center for the canine sniff.

Reasonable suspicion may permit government officials temporarily to detain a package pending further investigation, such as use of a canine, that leads to the establishment of probable cause but

most courts have addressed the detention of a package in the location where the reasonable suspicion originated. In this case, the package was removed from the place where the reasonable suspicion originated. The officer had reasonable suspicion to suspect the defendant's package, and this level of suspicion would have justified a decision to detain the package at the private business pending further investigation. By transporting the package, the officer executed the seizure in a manner contrary to the constitutional prohibition against unreasonable searches.

To be valid a full-fledged seizure requires either probable cause supported by an exception to the warrant requirement, or a warrant. A Terry stop of a package is distinguishable from a full-fledged seizure supported by a probable cause. Reasonable suspicion is an inadequate basis upon which to transport the defendant's package to the law enforcement center. If the police are unable to investigate in a manner consistent with the level of suspicion they possess, the proper result is to cease the investigation and not impinge constitutional protections.

The court recognized that a canine sniff discloses only the presence or absence of narcotics, a contraband item, and does not constitute a search within the meaning of the fourth amendment. A canine sniff does not, in and of itself, implicate a person's legitimate expectations of privacy. A positive canine sniff establishes probable cause.

In this case, after establishing probable cause to suspect the defendant's shipment, the officer proceeded to inventory the full contents of the package without first obtaining a warrant. At this point, the defendant still maintained a legitimate expectation of privacy in the contents of the magazines not inspected during the private party search. Probable cause alone does not justify a warrantless search of a package absent an exception to the warrant requirement. The court concluded that the police search of the package was not conducted to protect or safeguard either their interest or the defendant's property interest. Rather, the search of package was carried out in the midst of a criminal investigation. Absent a warrant or valid exception to the warrant requirement, searching of the defendant's package at the law enforcement center was in violation of the fourth amendment.

### **JUROR COMMUNICATIONS - ALLEN CHARGE**

In *State v. Parisien*, 2005 ND 152, 703 N.W.2d 305, the court reversed the defendant's convictions of gross sexual imposition and other felony offenses concluding the trial court committed error in answering jury questions in the defendant's absence. In addition, the court concluded, based upon the circumstances of this case, the verdicts were improperly coerced.

Before final arguments, jurors sent the trial judge a note stating that one of the jurors had to care for her elderly mother in the evenings and other jurors would want to call family members. The judge responded in a note that he could not excuse the jurors but he hoped other arrangements could be made to meet their needs. The jury retired for deliberations at 7:40 p.m., four hours after close of the evidence,

At 11:25 p.m. during its deliberations, the jury sent several questions to the court. At 12:15 a.m. the jury send another note indicating it was hung on the most serious felony offense. The defendant was not present with his attorney during a conference between the judge and the respective counsel. The proceedings were not recorded.

The court advised the jury, in a note, to continue deliberations. Finally, at 2:19 a.m. the jury returned verdicts finding the defendant guilty of three felony charges.

The defendant claimed the trial court committed error in answering the jury's questions in his absence and without calling the jury into open court. Agreeing with the defendant, the court noted that a defendant has a right to be present in the courtroom at every stage of trial. After a case has been submitted to the jury all communications must be made in open court and in the defendant's presence. Violating the right to be present is subject to the harmless error standard for constitutional errors. The rights afforded to the defendant under the statutory right to be present, N.D.C.C. § 29-22-05, are not absolute and may be waived by failing to object to the trial court's procedure in responding to the jury's request. In this case, however, the court held the trial court committed error in responding to the jury's questions in the defendant's absence and without calling the jury into open court where a proper record could be made of discussions concerning those questions.

The court also concluded the jury was coerced into rendering the guilty verdicts by being kept late into the night to deliberate and being instructed by the trial court to try and reach a verdict even after the court had been advised the jury was deadlocked, at least as to one charge, and may have known of a jury's numerical division.

A trial court has broad discretion over the conduct of a trial including the time in which a jury may properly deliberate, but the court must exercise this discretion in a manner that best comports with substantial justice. The mere length of time a jury is kept in deliberations, in itself, does not establish that a verdict was coerced. However, where the jury deliberations are prolonged beyond a reasonable period a verdict might be forced since the verdict of such a jury may be the result of fatigue, exhaustion, weariness, or coercion, instead of the result of free action and voluntary agreement of each individual juror.

One circumstance often accompanying long jury deliberations is a trial court giving a deadlocked jury an instruction based on Allen v. United States, 164 U.S. 492 (1896) (an Allen charge). This is a supplemental instruction given to encourage deadlocked jurors to reach agreement. A trial judge's knowledge of the numerical division of a deadlocked jury is also an important factor to consider in assessing improper coercion. A trial court may not ask a deadlocked jury the nature or extent of its numerical division. Disclosing a jury's numerical split may influence the judge to insist the jury continue deliberating and reach a verdict because holdouts may give in at any time. Under some circumstances inadvertent disclosure to the trial court of the nature and extent of the jury's numerical division before the issuance of an Allen charge has been held to be at least as coercive as the inquiry itself. Most courts hold that disclosure of the jury's numerical split is simply a factor to

consider in assessing whether the totality-of-the-circumstances indicate a coerced verdict.

Although the defendant's trial attorney did not object to the trial court actions during deliberations, the court concluded that the defendant established obvious error affecting the substantial constitutional right to be present and to a fair trial which permitted the issue to be presented and considered on the appeal.

The last day of trial was a Friday before an early summer weekend. The trial began at 9:30 a.m. and the jury did not return verdicts until 2:19 a.m. the following morning. At least one juror expressed reservations about staying at the courthouse into the night. Both the defense attorney and prosecutor stated it was a long trial and everyone was exhausted. The court assumed the jury was equally exhausted.

The jury was not called into open court where a proper record could be made of the discussions concerning the jury questions as required by N.D.C.C. § 29-22-05. If the procedure had been followed, the trial court and counsel would have had an opportunity to observe the appearance of the jurors and the sounds of their voices in assessing the effect of the prolonged late night deliberations and in deciding whether to adjourn or to continue deliberations until the verdicts were rendered. If the communications had been conducted in open court or if the in-chambers discussion had been recorded, a complete record of the proceedings would have been made available to enable the court to determine whether the defendant knowingly and voluntarily forfeited any objection to these procedural irregularities. Based upon these factors, the trial court's knowledge of the deadlocked jury's numerical division, its encouragement to try and reach a verdict, the court concluded the verdicts were improperly coerced, in violation of the defendant's due process right to a fair trial.

### **FACTUAL BASIS FOR PLEA OF GUILTY**

In *State v. Oie*, 2005 ND 160, \_\_\_\_ N.W.2d. \_\_\_\_, the court affirmed the criminal judgment entered against the defendant based upon the defendant's plea of guilty.

On appeal, the defendant claimed his North Carolina v. Alford, 400 U.S. 25 (1970) guilty pleas were invalid because the record did not establish

a factual basis for the pleas. The court found the district court made an open court inquiry into the factual basis of the pleas and supplemented such basis with information contained in the presentence investigation report. Factual basis is to be established to the district court's satisfaction and may be provided by a presentence investigation report.

## **POST-CONVICTION RELIEF - INEFFECTIVE ASSISTANCE OF COUNSEL**

In *Sayler v. State*, 2005 ND 166, \_\_\_\_ N.W.2d \_\_\_\_, the court affirmed an order denying Sayler's petition for post-conviction relief.

Sayler asserted his trial counsel failed to call a medical expert as a witness.

Matters of trial tactics, such as whether to call a certain witness, are not to be second guessed on appeal. However, trial counsel's failure to have a critical witness testify, coupled with other errors committed by counsel, can result in a denial of effective assistance of counsel. When arguing that failure to call a witness was ineffective representation, a defendant must show how any additional witnesses would have aided the defense's claim.

A court will look to the crime charged to determine whether a witness's testimony is critical to the outcome of the case. A witness's testimony on an essential element of a crime or defense to a crime can be highly relevant testimony.

In this case, however, there was no testimony offered at the post-conviction hearing on the essential element of Sayler's intent relating to the acquisition of a controlled substance. The

proposed witness merely would have discussed prescribing a controlled substance after a surgery similar to that performed upon Sayler. Assuming the prescription to be medically appropriate and typical under the circumstances, the testimony did not address the element of Sayler's intent.

The court also noted Sayler could not show he was prejudiced by the failure to call the witness, or that the outcome of the case would be different absent the claimed errors. The jury had ample evidence to support the defendant's conviction of acquiring a controlled substance by deception and delivery of a controlled substance. One of the defendant's friends testified that Sayler had an intent to deceive and did not need the prescription to receive narcotic drugs. Sayler stated to the witness that he was going to sell the drugs. Even if the jury heard the medical practitioner's testimony that a prescription following surgery was customary, based on the evidence presented at trial, the jury could still convict Sayler on the deception charge. The court could not conclude the outcome would be any different with the additional testimony of a medical expert describing the typical prescription of pain medication.

## **RELEVANT INFORMATION - ELEMENTS OF OFFENSE - MOTION TO ARREST JUDGMENT**

In *State v. Frankfurth*, 2005 ND 167, \_\_\_\_ N.W.2d \_\_\_\_, the court affirmed the district court's order arresting judgment after the defendant's conviction for gross sexual imposition.

The defendant was convicted of gross sexual imposition. The information alleged the defendant engaged in a sexual act while the victim was unaware a sexual act was being committed. After the verdict but before sentencing, the defendant moved for arrest of judgment, asserting the information lacked an essential element of the offense and failed to charge a crime. The criminal information failed to allege that in accordance with N.D.C.C. § 12.1-20-03(1)(c), the defendant knew his victim was unaware of the sexual act being perpetrated on her.

The district court granted the motion, dismissing the charges with prejudice. Upon reconsideration, the court dismissed the charges without prejudice but would not reinstate the jury verdict.

On appeal, the state argued the information was not defective because it properly notified the defendant of the charges against him and any missing elements could be implied from the face of the information.

The court has stated technical defects in an information are not fatal to its validity. The sixth amendment notice requirements are satisfied provided a criminal information is sufficiently specific to provide the defendant with notice of the pending charges and enable the defendant to prepare a defense. The state argued that the language used, plus the inclusion of the citation for the statute violated, constituted sufficient and appropriate notice to the defendant. The court disagreed.

An information must contain a written statement of the essential elements of the offense. Knowing the victim was unaware is an essential element of the

offense charged and could not be inferred. Because it was missing from the information, the criminal information was defective.

Failure to charge an offense is a valid ground for arrest of judgment under North Dakota Rule of Criminal Procedure 34. A motion for arrest of judgment need not be made prior to trial but should be filed within seven days of a verdict or a finding of guilt. The defendant's motion was timely.

A defective information can not be cured through proper jury instruction or other means short of amendment. North Dakota Rule of Criminal Procedure 12(b) allows, and Rule 34 requires, arrest of judgment when no offense is charged.

Upon arrest of judgment, the defendant was placed in the same position he would have been had no crime been charged. The effect of an order arresting judgment is to place the defendant in the same situation he was before the information was filed. The defendant may be reprosecuted under a new information as if there had been no prior proceedings.

The court did, however, reject a claim by the defendant that the defective information prevented the district court from acquiring jurisdiction over him. Jurisdiction is not lost because of errors in an information if jurisdiction exists over the crime intended to be charged. The district court had jurisdiction over the defendant and this matter notwithstanding the defective information.

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